STATE OF MICHIGAN

COURT OF APPEALS

TERRENCE BRIAN SWEENEY,

Plaintiff-Appellant,

v

TRACY STARR SWEENEY,

Defendant-Appellee.

UNPUBLISHED
April 6, 1999

No. 209669
Washtenaw Circuit Court
LC No. 95-003235 DM

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

In this divorce case, plaintiff appeals as of right from the circuit court order granting defendant sole legal and physical custody of the parties' minor children. We affirm in part and remand.

Plaintiff sought sole legal and physical custody of the parties' two minor sons, Tanner and Trey, while defendant sought joint legal and physical custody. The parties had been awarded temporary joint legal and physical custody in November 1995, and that arrangement continued for the two years preceding the conclusion of the instant trial.

The court-appointed psychologist who evaluated the children and the parties, and participated in the treatment of the parties, testified at trial as an expert. He recommended that joint custody continue,[1] while noting that both parents needed to more aggressively seek counseling.[2]

I

In reviewing custody cases, all orders and judgments shall be affirmed on appeal unless the trial court made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); MCL 722.28; MSA 25.312(8). Whether a custodial environment exists is a question of fact which the trial court must address before ruling on the best interest factors. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). While clear and convincing evidence must be presented to change custody if an established custodial environment exists, where there is no established custodial environment, a change in custody

may be made if supported by a preponderance of the evidence. *Hayes v Hayes,* 209 Mich App 385, 388; 532 NW2d 190 (1995). Here, the trial court committed clear legal error when it decided the issue of custody without first determining whether an established custodial environment existed.

Further, the trial court grouped some of the best interest factors into three categories, while not addressing others.[3] By doing so, the court failed to fulfill its obligation to consider each factor individually, and to explicitly state its findings and conclusions with regard to each of the best interest factors. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998); *Treutle v Treutle*, 197 Mich App 690, 694; 495 NW2d 836 (1992); *Truitt v Truitt*, 172 Mich App 38, 47; 431 NW2d 454 (1988).

Accordingly, we must remand for a determination whether an established custodial environment exists, application of the corresponding burden of proof, and for the court to consider and articulate its findings of fact with respect to each of the best interest factors. The court shall speak with the children in order to address factor (i), the reasonable preferences of the children.[4] *Treutle, supra* at 695-696; *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). We further note that on remand the trial court may not emphasize one best interest factor to the exclusion of the others, *Truitt, supra* at 46-47, but is not obliged to weigh all factors equally.

We need not address plaintiff's claims that the trial court made findings and conclusions that were against the great weight of the evidence, because our remand will require reevaluation of and explicit fact findings regarding all the factors. *Ireland v Smith,* 451 Mich 457, 468; 547 NW2d 686 (1996). We do note, however, that it appears that the court focused almost exclusively on plaintiff's temper and lack of cooperation with defendant, and ignored the considerable testimony that plaintiff had a good relationship with the children, sharing custody for the preceding two years, and the expert's concerns regarding defendant's substance abuse and the children's need for joint custody.[5]

Plaintiff also challenges the court's determination regarding visitation. Although the court's determination on remand may necessitate reconsideration of the visitation issue and render this issue moot, we do note that we disagree with plaintiff's argument that the trial court improperly left visitation to defendant's "whim." The trial court's opinion awarded plaintiff reasonable visitation and further provided that, if the parties could not agree on the terms, the matter would be referred to the Friend of the Court, whose recommendation would be implemented until further order of the court.

We agree with plaintiff that on remand, the child support issue should be reconsidered if the trial court's disposition changes.

II

Plaintiff next argues that the trial court erred in failing to follow the order setting aside the default judgment of divorce and denying a hearing on contested property issues, failing to take evidence on property issues, including attorney fees, and failing to make independent findings of fact and conclusions of law supported by the record, resulting in an inequitable division of property.

Plaintiff filed his complaint for divorce on March 23, 1995. Defendant counterclaimed. Three different judges presided over this case. A "mutual ex parte restraining order against property transfer" was entered on May 24, 1995. The Friend of the Court made a preliminary recommendation, dated December 27, 1995, that plaintiff pay defendant child support of $152 per week.

On May 23, 1996, the first circuit judge to whom the case was assigned entered a default judgment of divorce after plaintiff's counsel failed to appear on the date set for trial. The default judgment included property division provisions and reserved the issue of child custody.

The case was reassigned to a second judge, and a hearing on plaintiff's motion to set aside the default judgment was held on September 18, 1996. At the hearing, the court stated in pertinent part:

> Having read what's been filed I considered the matter. I'm not ruling on whether it was proper for Judge Morris to enter the default but whether under all the circumstances it should be set aside. I'm granting the motion to set aside the default upon the payment of the expenses of the defendant for appearing, prepared for trial. There are two ways we can deal with that. You can tell me Ms. Gallagher [defendant's counsel] what you think it should be and Mr. Ritchie [plaintiff's counsel] and the three of us can discuss that or the two of you can discuss [sic]. Certainly that should be paid before the default would be set aside and then I think the thing to do would be to set a settlement conference and a trial date.
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> MS. GALLAGHER: Your Honor, I think it would be about $800. Your Honor, if I may?
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> THE COURT: Yes.
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> MS. GALLAGHER: To the extent that you had set aside the default I would implore you not to set aside the provision that deals with child support.
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> THE COURT: The other –
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> MS. GALLAGHER: That comports with the Friend of the Court's recommendation in this matter and the custody is already reserved. If you want to set aside the provision for property settlement, that's fine. But child support is something that is incredibly important to my client in terms of taking care of the children.
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> THE COURT: I'm not going to set aside the provisions of the order as they exist except to say that Mr. Ritchie and his client may have a hearing to determine whether they should be modified. I don't think the parties want me to set aside the fact that they're divorced.
>
> MS. GALLAGHER: My client does not.

THE COURT: I don't know that you can get undivorced if you are divorced. But the real issue is whether Mr. Ritchie's client should have the opportunity to have a trial on whatever the contested issues and my ruling is that they may such [sic] a trial.

My suggestion would be that the judgment of divorce, which has been entered, would remain entered but that an order enter that the – I can't come up with the proper terminology, but in any event –

MS. GALLAGHER: Modification.

THE COURT: Well, except it's not modifying in the sense that there's any burden of proof to show that it was wrong. It's a hearing de novo to decide what the provisions should be.

MR. RITCHIE: You Honor, if that's the way the Court chooses to handle it, and I have no objection to that, then I would ask the Court to stay enforcement of the judgment except for the child support provisions.

The reasons for this is that Ms. Sweeney, especially in the last couple of days, has been frantically trying to run down and say I have a divorce judgment, I have a right to have all this. When this happened, when I was stuck in that Kalamazoo court [on the date the default judgment was entered], if you watch the tape you saw them literally have a laundry list of everything they wanted. Once this woman gets her hands on this stuff it's gone. That's the way she is.

MS. GALLAGHER: Your Honor, I don't have any objection to staying the provisions of the divorce, but for child support as long as I get a check for the $800.

*** * ***

THE COURT: . . . . If we can set a final settlement conference and a trial date.

MS. GALLAGHER: Your Honor, I encourage that but I am also willing on behalf of my client to have this thing referred to the Friend of the Court in any binding way that it could be under property issues.

MR. RITCHIE: I didn't understand what I just heard.

THE COURT: She suggested that if the parties would agree it could be referred to the Friend of the Court for a binding recommendation as it relates to the property issues.

MS. GALLAGHER: As well as the custody.

THE COURT: Why don't we do this. Let's set it as I suggested and then you can discuss that. Certainly, if you agree to something along those lines the might [sic] be a

way to resolve it. You can go in and talk to my secretary about contacting Central Assignment for the dates or you can go down there today yourselves if you wanted to do that. I can't give you the dates.

MS. GALLAGER: For your pre-trial?

THE COURT: Yes. It would be for a final settlement conference and a trial date, or would you rather just come in on a settlement conference without setting a trial date at this point?

MR. RITCHIE: I think a trial date would be a good idea. This one has been a long time [sic] and if we do wait until then and we do go to trial we're pushing it back further.

THE COURT: Thank you.

MR. RITCHIE: Thank you, your Honor.

MS. GALLAGHER: Thank you.

The second judge entered an order on December 5, 1996, entitled "order staying default judgment with costs," and providing in pertinent part:

> [T]he Default Judgment entered in this case is hereby stayed, except that the provisions granting a divorce to the parties and those provisions regarding child support shall remain fully in effect and enforceable.
>
> It is hereby further ordered that the Defendant's attorney shall submit a bill of costs to the Plaintiff's attorney and the Court, and that the Plaintiff's attorney shall pay those costs reasonably caused the Defendant's attorney by the Plaintiff's attorney's failure to appear at Court for Trial.

The third judge assigned to this case presided at the trial, which was held over two days in September and November 1997. On the second day of trial, after various exhibits were received, the following colloquy took place:

THE COURT: What's remaining with the property issue?

MR. RITCHIE: I agree with fellow counsel that a half hour in Chambers we can resolve that issue.

THE COURT: I want everything in otherwise this thing will continue to keep on going. The judgment of divorce?

MS. GALLAGHER: 5-23-96 in front of Judge Morris, your Honor. There is a property settlement contained in that judgment. I would, of course, on behalf of my client ask this Court to adopt and reaffirm it.

THE COURT: I thought the only issue remaining was the custody parenting time.

MR. RITCHIE: No, your Honor. What happened was that on the date in question I had a probate trial and a circuit court trial. The probate trial was – I submitted briefs on this and got it set aside by the next judge which was Karl Fink. Then I was waiting on things from fellow counsel that initiated how we were going to set it aside. She was supposed to submit me a bill, but he clearly ruled –

MS. GALLAGHER: No, no. That had nothing to do with the set aside. That was just my motion for costs and expenses that you objected to and requested an itemized bill. I haven't given it to you yet but that was I think a clearly collateral issue. Actually, I believe he stayed.

THE COURT: What I'll do is, I'll review the court file on that issue. If I determine that there is anything set aside such that a hearing is necessary I'll notify you and we'll have a hearing on it.

After all trial testimony was completed, the following colloquy occurred:

THE COURT: Here's what we're going to do. I'm going to read these documents. I'm going to read them tonight and tomorrow. Each of you can pick up your own documents tomorrow. I'm going to read these and fashion what I think is close to my decision and I want to hear from you.

MS. GALLAGHER: Your Honor, say that again?

THE COURT: I'm going to read these documents that have been submitted. I'm going to read them tonight. You can pick them up tomorrow afternoon. My thinking is you can do closing Thursday morning and I'll give you a decision.

MS. GALLAGHER: Okay. We do closing Thursday morning. What are we going to do on the property issues, if any?

THE COURT: I'm going to try to look at the file and give you a decision when I have more time on that. Let's take care of this part first.

MS. GALLAGHER: Okay.

THE COURT: And then if we do have to do property it will be short. If I don't do it we'll pick a date in a few days.

The trial court's opinion and order, issued on December 18, 1997, stated in pertinent part:

> On December 2, 1996, Judge Fink stayed the Default Judgment. Judge Fink did not set the Default Judgment aside, which reserved custody pending the final recommendation of the Friend of the Court.

The court's opinion did not specifically refer to division of property, but stated, "All other terms of the Judgment previously entered remain in full force and effect."

A court speaks through its orders. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). However, we think it clear that the second judge assigned to this case, and both parties, left the September 1996 hearing with the understanding that the court had determined that the property provisions of the default judgment of divorce would be stayed and plaintiff would be granted a hearing on the contested property issues.[6]

Under these circumstances, and given that scant, if any, evidence was introduced concerning property division, we conclude that the court erred in reaffirming the property distribution provisions of the default judgment without according plaintiff a hearing. We vacate the property distribution provisions and order that the issue be addressed on remand.[7]

III

Plaintiff also argues that the trial court's entry of a personal protection order (PPO) was without evidentiary support. The default judgment of divorce contained a provision issuing a restraining order, to remain in effect for five years. On the same day that the trial court entered its opinion and order, defendant submitted a petition for, and the court granted, an ex-parte PPO. We disagree with plaintiff that the order had no evidentiary support. Defendant testified that plaintiff had been violent and threatened her on several occasions. Nonetheless, we think it prudent for the trial court to revisit the scope of the order on remand, as plaintiff argues that the PPO's provision preventing him from appearing within defendant's sight interferes with his ability to attend the children's school functions and other functions.

IV

Plaintiff last argues that the trial court was biased against him because he refused to agree to joint custody and settle the matter. Although we agree that the court's opinion was strongly worded, we conclude that plaintiff has failed to demonstrate any bias or prejudice that is personal and extrajudicial. *Cain v Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996); MCR 2.003(B)(1). The fact that the trial court ruled against plaintiff is, by itself, insufficient to establish bias. A court's opinions, formed on the basis of facts introduced into evidence or events occurring during the course of the proceedings, do not constitute a basis for finding bias or partiality unless they display a deep-seated favoritism or antagonism that make a fair judgment impossible. *Cain, supra* at 496. We find no evidence of such a settled predisposition to the detriment of plaintiff or his attorney in this case. *Kiefer v Kiefer*, 212 Mich App 176, 183; 536 NW2d 873 (1995).

Affirmed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White

[1] The Friend of the Court evaluator had also recommended that the shared custody arrangement continue. Plaintiff objected, seeking sole custody.

[2] The psychologist noted in this regard in an August 30, 1997 letter to the court updating his June 1997 child custody evaluation:

> 1. As you will see from documentation with this letter, Mr. Sweeney's drug screens have been negative. We seem to be missing one drug screen from Ms. Sweeney which was negative and there is one attached which is positive for marijuana. Ms. Sweeney continues to manifest an active drug abuse disorder with respect to marijuana and possibly with respect to alcohol. While her drug screens for marijuana have been negative, it has been quite clear that she has continued to use marijuana on an episodic basis throughout the last several months. She does not seem to be dependent on marijuana in the clinical sense, but she does use it with regularity; it is part of her life. If you will recall in the body of the report that I gave you in late June, I suggested that there was a judgement call to be made between requiring treatment versus allowing Ms. Sweeney to continue to try to stabilize herself financially. My current feeling is that it is probably time for Ms. Sweeney to go ahead and take part in an intensive outpatient treatment program for women. It is my understanding from her that she now has an evening job which supplies a substantial part of her income and so there is no longer a vocational interference with the day time intensive outpatient program. In any case, the intensive outpatient program only lasts three weeks or so, and she could certainly resume whatever her daytime vocation is after that point.
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> 2. Mr. Sweeney has recently advised me that he has discontinued participating in the Catholic Social Services Domestic Violence program. His reason for doing so was that he felt he could not afford the $70 per session that this program required him to pay. This program slides fees based on income and analyzed Mr. Sweeney's income and came up with that particular fee. I do not find this a particularly convincing reason for quitting this program. This is a convincing reason for sitting down with the individuals of that program and trying to renegotiate a fee, or renegotiate the program track he is on there, or something like that. Bear in mind, this man has had money to hire private investigators to follow his wife around trying to prove something which has been proven long ago (namely that she has a substance abuse disorder), but he is unable to pay the

> fee for his treatment that his income, in their estimation, should allow him to pay. My recommendation here is that Mr. Sweeney should continue treatment.
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> 3. The third matter which still concerns me in this case is the level of abusiveness that exists between these two parties. The level of abusiveness dropped following court appearances in May and June, when you forcefully instructed these individuals that they were to have limited contact with each other. However, voice mail, while allowing them to limit the direct exchange of abusive comments does allow them each to leave repeated hostile messages for each other. Ms. Sweeney has been in the office to play a tape for us of Mr. Sweeney ranting in the most vile manner toward her. Mr. Sweeney reports to us directly (and I find this a credible report) that Ms. Sweeney, too, leaves him messages which are abusive and hostile, and probably vile. Neither of them is sufficiently attuned to the damage this does to their children. Bear in mind, what I am talking about here is the damage it does to the children for the children to hear either one of them ranting about the other. It does damage to the relationship the ranter has to them. This is part of the reason that [the oldest child] is so symptomatic at the present time. Additionally, the level of insensitivity that is occasionally manifest is appalling. . . . . Each of these parents should be much more concerned about their own loss of control, and a little less fascinated and over-involved with their former partner's loss of control. Each parent has serious emotional work to do to raise his or her own maturity level so that they can each continue to improve as parents.

[3] The trial court's opinion and order stated in pertinent part:

> These variables [the best interest factors] can be subsumed into three more general categories: Bonding between the parent and child (subsection *a, d, e* and *h*]), parenting abilities (subsection [*b, c, f, j,* and *k*]) and the child's preference (subsection [*I*]).]

[4] The children are now eight and six years old.

[5] The court's opinion, while incomplete, explains why it rejected plaintiff's request for sole custody. It is not clear, however, why the court discontinued joint custody in the face of defendant's request for joint custody, her admission that she drinks when plaintiff has custody of the children, and the expert's and Friend of the Court's recommendation that the joint custody arrangement continue.

[6] This is supported by defense counsel's remark in opening statement that the default judgment was set aside by the second judge.

[7] We are unable to address plaintiff's claim that the property division was inequitable given the dearth of evidence before us.